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Chairman: Mr. Tulbure ..... (Moldova)

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The meeting was called to order at 10.25 a.m.

Agenda item 82: Report of the International Law Commission on the work of its fifty-ninth session (A/62/10)

1. **The Chairman** expressed the Committee's appreciation of the contribution that the International Law Commission continued to make to the progressive development of international law and its codification, in accordance with Article 13 of the Charter of the United Nations. At each regular session of the General Assembly, consideration of the Commission's report was a high point in the Committee's work.

2. **Mr. Brownlie** (Chairman of the International Law Commission), introducing the Commission's report (A/62/10), said that the feedback provided by the Sixth Committee, through its comments on the Commission's annual reports, as well as on its drafts and on specific questions, was a central aspect of the process of codification and progressive development of international law. The Commission relied on the Committee for advice from Governments and information on State practice that was not easily accessible to the public, particularly in the case of emerging practice, and welcomed the initiatives taken by the Committee to enhance the exchange of views on the report.

3. Referring first to chapter X of the report, he said that the Commission had continued to cooperate with other bodies: it had received the traditional visit from the President of the International Court of Justice and had maintained its long-standing involvement in the International Law Seminar. As the fifty-ninth session had been the first in the new quinquennium, the Commission had been particularly concerned with matters of programmes, procedures, working methods and documentation.

4. The Commission had decided to include two new topics in its programme of work, namely "Protection of persons in the event of disasters", and "Immunity of State officials from foreign criminal jurisdiction". The Working Group on the Long-Term Programme of Work had been established and would submit its final report at the end of the current quinquennium. It had already considered a number of possible topics, including one entitled "Subsequent agreement and practice with respect to treaties". In addition, support for the inclusion of the topic "The most-favoured-nation clause" in the work programme had been expressed by the Working Group set up on the subject, which had concluded that further work on the topic was justified and that the Commission could help to clarify the meaning and effect of the clause in the field of investment agreements.

5. The issue of honoraria, which affected the work of the Special Rapporteurs, continued to be of concern to the Commission; it urged the General Assembly to reconsider the matter with a view to their restoration. To mark the Commission's sixtieth anniversary, in 2008, it recommended the convening of a commemorative meeting, to be combined with a one-and-a-half-day session with legal advisers, which would be dedicated to the work of the Commission. The two events were planned to take place in Geneva on 19 and 20 May 2008 during the first part of the Commission's session, to be held from 5 May to 6 June; its second part would run from 7 July to 8 August 2008. He hoped that as many legal advisers as possible, representing all legal systems and cultures, would be able to attend the commemoration. The Commission also recommended that Member States, in association with existing regional organizations, professional associations, academic institutions and concerned members of the Commission, should be encouraged to convene national or regional meetings focusing on the work of the Commission.

6. The Commission continued to rely heavily on the Organization's legal publications, while being concerned about the delay in the publication of its own *Yearbook*. It proposed that a trust fund should be established to address that important issue, over and above the necessary budgetary allocations in the regular budget. In order to safeguard the integrity of the abundant documentation that it had itself produced, it had adopted guidelines on external publication of Commission documents (A/62/10, para. 381).

7. He concluded his remarks on chapter X by expressing the Commission's appreciation of the assistance given to it by its secretariat, the Codification Division of the Office of Legal Affairs. In addition to being involved in the substantive, procedural and technical servicing of the Commission, the Division offered an invaluable link between the Commission and the Committee. He also noted the work done by the Division to develop a website on the Commission's work and encouraged it to continue to update it.

8. Turning to the substantive chapters of the report, he said that chapter VI dealt with "Expulsion of aliens". In his second report on the topic (A/CN.4/573 and Corr.1), the Special Rapporteur had presented two articles setting out its scope and defining its constituent elements. In his third report (A/CN.34/581), he had presented five draft articles dealing respectively with: the right of expulsion; the principle of non-expulsion by a State of its own nationals; the principle of non-expulsion of refugees; the principle of non-expulsion of stateless persons; and the prohibition of collective expulsion. The Commission had decided to refer to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur during the session, as well as draft articles 3 to 7.

9. The importance and timeliness of the topic had been emphasized by several members of the Commission, in particular in the light of the phenomena of illegal immigration and refugee flows, and in the context of efforts undertaken by States to combat terrorism. A significant portion of the debate had centred on the delimitation of the scope of the topic and the use of terms. As for the measures and situations to be covered (scope *ratione materiae*), there had been general agreement in the Commission that "expulsion" for the purposes of the draft articles should cover not only "formal acts" but also situations in which a State, by its conduct, compelled an individual to leave its territory. It had been suggested that such conduct must involve a mode of compulsion that left the alien no option but to leave the territory of the State. Although some members had favoured the inclusion of denial of admission within the scope of the topic, at least with respect to aliens seeking admission into a State while already in an international zone of that State, several members had taken the view that denial of admission must remain excluded from it. Extradition had also been considered to be outside the topic, with the possible exception of an expulsion that would constitute disguised extradition. While some members had favoured the inclusion of extraordinary or extrajudicial transfers within the topic, some other members, including the Special Rapporteur, had been of the opinion that making such transfers subject to the rules on expulsion might compromise the efficiency of State cooperation in the fight against crime, including terrorism. On the question of the inclusion within the scope of the topic of expulsions occurring in situations of armed conflict, some members had taken the view that the Commission should refrain from dealing with an issue that was already covered by the law of armed conflicts. Some other members had favoured the inclusion of the expulsion of enemy aliens in situations of armed conflict; the Special Rapporteur, in particular, had considered that such expulsion was not governed by international humanitarian law instruments.

10. Concerning the scope *ratione personae*, several members had found that the term "*ressortissant*", proposed by the Special Rapporteur rather than "national" in opposition to the notion of "alien", was too broad and difficult to translate. The terms "national" and "*ressortissant*" would therefore be used as synonyms in the Special Rapporteur's future reports. It had been agreed to include aliens legally and illegally present in the territory of the expelling State, provided that due account was taken of the distinction between the two in the legal regime to be developed by the Commission, and to exclude aliens entitled to privileges and immunities under international law. Only natural persons would be covered by the draft articles. Conflicting views had been expressed on the possible inclusion of refugees, stateless persons and migrant workers and on the appropriateness of including, in a draft article on "Scope", a list of categories of aliens to be covered.

11. The need to define the notions of "territory" and "frontiers", contained in draft article 2, had given rise to some discussion in the Commission, and the Special Rapporteur had expressed the opinion that the concept of "zone" (for example a port, airport, or customs zone) was more appropriate than that of "line" to define the frontiers of a State in relation to expulsion matters.

12. With regard to draft article 3, the right of a State to expel an alien, whether inherent in State sovereignty, as suggested by the Special Rapporteur, or recognized by customary law, as indicated by some members, had not been disputed. Several members had expressed support for the general approach taken by the Special Rapporteur in trying to reconcile the right of a State to expel aliens with the relevant rules of international law, in particular those relating to the protection of human rights and the minimum standard for the treatment of aliens. Moreover, there had been some discussion on the best way to state in general terms that the right to expel was subject to several limitations in accordance with international law.

13. Some members had questioned the appropriateness of draft article 4, on prohibition of the expulsion of nationals, given the title of the topic, but broad support had been expressed for its inclusion. Moreover, while several members had observed that the "exceptional reasons" which, according to draft article 4, might justify the expulsion by a State of one of its nationals required clarification, some other members had challenged the existence of exceptions to the rule prohibiting the expulsion of nationals.

14. On the question of dual or multiple nationality, as well as the relevance of the "effective nationality" in that context, some members had felt that further study was required, while others, including the Special Rapporteur, had not felt it appropriate to address those issues, if the Commission's intent was to help strengthen the rule prohibiting the expulsion of nationals. Some other members had observed that only the deprivation of nationality as a possible prelude to expulsion, and not the expulsion of nationals as such, would fall within the scope of the topic. The Special Rapporteur would analyse further the issue of expulsion of persons having two or more nationalities, which could have an impact in the context of the exercise of diplomatic protection in case of unlawful expulsions; he was also planning to study, with the assistance of the secretariat, the question of deprivation of nationality as a prelude to expulsion.

15. Draft articles 5 and 6 dealt with the expulsion respectively of refugees and stateless persons. The Special Rapporteur had considered that the 1951 Convention relating to the Status of Refugees did not provide a comprehensive regime for the expulsion of refugees and that the Commission should address the question of the temporary protection and residual rights of de facto refugees. The appropriateness of including the two draft articles, while recognized by some members, had been questioned by others, in particular because of the risk of creating conflicting regimes. Similarly, the Special Rapporteur's proposal that the draft articles should include an express reference to "terrorist activities" as possible grounds for expelling a refugee or a stateless person had been rejected by several members, who had cited the lack of a universal definition of "terrorism" and the fact that measures of expulsion on grounds of terrorism were already covered under "national security". Some members had not agreed with the Special Rapporteur's proposal to do away with the distinction made in the 1954 Convention relating to the Status of Stateless Persons between such persons in a regular situation and those in an irregular situation in the territory of the expelling State. However, the proposal, in draft article 6, that the host State, when expelling a stateless person, should intervene in the search for a receiving State had been welcomed by some members as a contribution to progressive development.

16. Draft article 7, on collective expulsion, drew a distinction between collective expulsion in peacetime and collective expulsion in time of armed conflict. The key element for the definition of "collective expulsion", as identified in the case law of the European Court of Human Rights, was whether or not the case of each of the aliens had been subject to "reasonable and objective examination". According to the draft article presented by the Special Rapporteur, collective expulsion in peacetime was prohibited in absolute terms, as confirmed by various legal instruments and the case law of regional human rights bodies. As for collective expulsion in time of armed conflict, the draft article stated that collective expulsion of enemy aliens must be confined to individuals who were hostile to the host State. In the view of the Special Rapporteur, that limitation was consistent with an emerging trend in practice and doctrine. While the prohibition of collective expulsion in peacetime had found broad support in the Commission, some members had expressed doubts as to the universal or absolute character of that prohibition. Some members had emphasized that the determining factor was qualitative and not quantitative, and that due account had to be taken of the principle of non-discrimination and certain procedural guarantees. It had also been observed that the notion of "collective expulsion" was vague and that the Commission should rather focus on discriminatory expulsions. Furthermore, conflicting opinions had been expressed on the existence of a prohibition of collective expulsion of enemy aliens in time of armed conflict. In particular, it had been suggested that collective expulsion of enemy aliens should be permitted if such a measure was necessary to protect enemy aliens from a hostile environment.

17. The Commission would greatly appreciate receiving comments by Governments on several points related to the topic "Expulsion of aliens", in particular on such aspects as: expulsion of nationals; the situation of persons having one or more nationalities in the

context of expulsion; deprivation of nationality followed by expulsion; collective expulsion in time of armed conflict; the existence of a right of return of an alien unlawfully expelled; the distinction between expulsion and denial of admission; the legal status of illegal immigrants in international zones; and grounds for expulsion.

18. Chapter VII of the report covered the topic "Effects of armed conflicts on treaties". At its fifty-ninth session, the Commission had examined the Special Rapporteur's third report (A/CN.4/578), which contained an analysis of the comments made by Governments in the Sixth Committee the previous year, together with several recommendations for new formulations, the inclusion of new provisions and the deletion of a draft article. The entire set of draft articles proposed by the Special Rapporteur was to be found in the annex to his third report. Following its consideration of that report, the Commission had established a Working Group tasked with providing further guidance on several issues which had been identified in the plenary debate.

19. The Working Group had divided its work into three clusters: (a) matters related to the scope of the draft articles; (b) questions concerning draft articles 3, 4 and 7; and (c) other matters raised during the plenary debate. The Working Group had completed its consideration of the first two clusters, but had not had time to finish all the items in the third. The Working Group would therefore probably be re-established the following year in order to wrap up its work on issues arising in the context of draft articles 8, 9 and 12 to 14, which included the procedure to be followed for termination or suspension of a treaty due to the outbreak of an armed conflict and the possible severability of provisions.

20. On the Working Group's recommendation, the Commission had referred to the Drafting Committee draft articles 1 to 3, 5, 5 bis, 7, 10 and 11 in the form proposed by the Special Rapporteur, as well as a new draft article 4. The Working Group had also drawn up a series of conclusions to guide the Drafting Committee's consideration of the draft articles referred to it. The Drafting Committee was likely to commence its work on the draft articles the following year.

21. The Working Group's first points of guidance related to draft article 1 (scope). In that context, it was noted that the draft articles should apply to all treaties between States when at least one of the parties was engaged in an armed conflict and that the consideration of treaties involving international intergovernmental organizations should be left until later. At the Commission's request, the secretariat had sent a note to international organizations to ask for information about their practice with regard to the effects of armed conflicts on the treaties they had signed. The guidance given on draft article 2 (use of terms) was that, in principle, the definition of armed conflict should cover internal armed conflicts, with the proviso that States should be able to invoke the existence of internal armed conflicts as grounds for suspending or terminating a treaty only when the conflict had reached a certain level of intensity. That intensity threshold had been introduced to underpin the continuity principle laid down in draft article 3. Moreover it had been noted that occupation in the course of an armed conflict should not be excluded from the definition.

22. On the second cluster of issues, related to the content of, and interaction between, draft articles 3, 4 and 7, the Working Group had had no difficulty in enunciating the principle of non-automatic termination or suspension provided for in draft article 3, but had decided to reformulate draft article 4 on the indicia of susceptibility to termination or suspension of treaties in case of an armed conflict, which had given rise to differing views at earlier sessions of the Commission and the Sixth Committee. The new wording provided that, in order to ascertain whether a treaty was susceptible to termination or suspension in the event of an armed conflict, it was necessary to bear in mind both the rules on the interpretation of treaties contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties and the nature and extent of the armed conflict, its effect on the treaty, the subject matter of the treaty and the number of parties to it.

23. With regard to the inclusion in draft article 7 of a list of categories of treaties whose object and purpose implied that they would continue in operation during an armed conflict, the Working Group had proposed that the two paragraphs of the draft article should be separated. The essence of paragraph 1 should be retained, with the *caveat* that its formulation should be aligned with that proposed for draft article 4 and that it should be located closer to that draft article. The Working Group had further advocated moving the list of categories from paragraph 2 to an appendix to the draft articles and indicating that the list was not

exhaustive, that various types of treaty might be subject to termination or suspension wholly or in part and that the list was based on practice, which meant that its contents might change over time. The Working Group had also suggested that the Drafting Committee should review the categories in the list in the light of views expressed in the plenary debate.

24. As for the third cluster, the Working Group had proposed the deletion of draft article 6 bis (the law applicable in armed conflict), since it raised an unexpectedly large number of issues. It had been felt that it would be better to handle its subject matter in the commentary to draft article 7. Furthermore, when the Drafting Committee considered draft articles 10 and 11 on the unlawful use of force, it should follow the policy laid down in articles 7, 8 and 9 of the 1985 Resolution of the Institute of International Law on that topic. It was not too late for Governments to submit their views on that proposal. In fact, it would still be useful if Governments were to supply information about their practice, especially their contemporary practice, with respect to the topic.

25. "Responsibility of international organizations" was the subject of Chapter VIII of the Commission's report. In 2007, the Commission had considered the Special Rapporteur's fifth report (A/CN.4/583). Following the pattern adopted in the articles on responsibility of States for internationally wrongful acts, that report had explored the content of the international responsibility of an international organization. On that basis, the Commission had been able to adopt 15 draft articles, namely draft articles 31 to 45, together with commentaries thereto. Those provisions comprised Part Two of the draft articles and spelled out the legal consequences for an international organization of the new legal relationship created by the commission by that organization of an internationally wrongful act.

26. Chapter I of Part Two contained draft articles 31 to 36 which set forth some general principles, most of which closely corresponded to the provisions included in the equivalent chapter of the articles on State responsibility. For example, draft articles 31 and 32, dealing with the legal consequences of an internationally wrongful act and continued duty of performance respectively, had reproduced the wording adopted in 2001, save that the term "State" had been replaced by "international organization", because the Commission had not found any reason to deviate from the language used in the articles on State responsibility. Draft article 33 addressed two separate, but interrelated, aspects of the breach of an international obligation which were not, however, per se legal consequences of such a breach, namely cessation of the wrongful act and assurances and guarantees of non-repetition. While practice in that area mostly concerned States, the Commission had not seen any merit in providing for a different rule in respect of international organizations. The same held true for draft article 34, which laid down the principle of reparation deriving from the *Factory at Chorzow* case. Despite the paucity of relevant practice in that area, most of it relating to the settlement of disputes concerning employment and contractual relationships, the Commission submitted that there was no reason to depart from the well-established principle as far as international organizations were concerned.

27. Unlike the preceding draft articles, draft article 35, which covered the irrelevance of the organization's rules, included a provision specific to the situation of international organizations. Whereas paragraph 1 enunciated the principle that an organization might not rely on its rules as justification for failure to comply with its obligations under Part Two, paragraph 2 stated that that principle was without prejudice to the applicability of the rules of an international organization in respect of the organization's responsibility towards its members. The Commission had felt that the special situation where the organization's rules might have a bearing on its responsibility towards its members should be addressed separately from the main rule reflected in paragraph 1. It might well be that the organization's rules modified the form of reparation it owed to its members. Making that point clear was the sole purpose of paragraph 2, which was also of relevance to any provision that might be formulated in future on *lex specialis*.

28. Draft article 36, concerned the scope of international obligations set out in Part Two. Although it reproduced the wording of the corresponding provision on State responsibility, it had prompted an extensive debate in the Commission. The main issue at stake had been whether there was any justification for limiting the obligations set forth in Part Two to those owed only to other organizations, States or the international community as a whole, without extending them to any other person or entity. In practice, a responsible organization might have more obligations

to such other persons or entities than a responsible State, as breaches by international organizations of their obligations often concerned employment and other areas directly affecting individuals. However, the Commission had considered it preferable to retain the solution adopted in 2001 for the sake of consistent legal interpretation. It was clearly understood that, as had been the case in 2001, the draft article in no way intended to downplay the rights of persons and entities other than States and international organizations. As pointed out in paragraph 2, Part Two was without prejudice to any right arising from the responsibility of an international organization, which might accrue directly to such persons or entities.

29. Chapter II of Part Two, dealing with reparation for injury, contained seven draft articles, namely draft articles 37 to 42, corresponding to articles 34 to 39 on State responsibility, and draft article 43, a supplementary article proposed by the Special Rapporteur in the light of the plenary debate.

30. Although practice concerning international organizations regarding the various forms of reparation and the issue of contribution to the injury was limited, there was no reason to consider that international organizations and States should be subject to different obligations as far as reparation was concerned. Hence, draft articles 37 to 41, which described in turn the various forms of reparation — namely restitution, compensation, satisfaction and interest — were closely modelled on the corresponding provisions on State responsibility. The Commission had devoted special attention to the question of satisfaction because, in the case of international organizations, that form of reparation might be used more frequently than restitution or compensation. It had also looked closely at the issue of humiliating forms of satisfaction, to which reference was made in draft article 40, paragraph 3. Although the possibility of being asked to provide such satisfaction was unlikely to occur in practice, it could not be completely excluded, especially in the context of the relationship between an organization and its member States. One hypothetical example might be that of a peacekeeping force whose acts could be attributed to the United Nations and, if wrongful, could entail its international responsibility. The injured party might request the Organization to give some form of satisfaction which would humiliate the State providing the force. If such a case ever arose, the Organization would be expected to consult the Member State concerned and to opt for some form of satisfaction which would not humiliate either the Organization or the Member State.

31. Draft article 42, concerning contribution to the injury, had attracted comments similar to those made in relation to draft article 36. The Commission contended that Part Two should cover only the responsibility of an international organization to a State, another international organization or the international community as a whole. That did not, however, mean that persons or entities other than States and international organizations could not be regarded as injured parties under other rules of international law, who might therefore potentially have contributed to the injury.

32. Draft article 43, entitled "Ensuring the effective performance of the obligation of reparation" had no equivalent in the articles on State responsibility and was essentially expository. It did not cover cases in which States and international organizations would be held internationally responsible for the act of an organization of which they were members. Its purpose was rather to remind those members that they were required to adopt all the appropriate measures in order to provide the organization with means for effectively fulfilling its own obligation to make reparation. The majority of the Commission held that the basis of that requirement was not to be found in general international law, but originated in the rules of the organization, whether or not it was expressly stipulated as being part of the obligation of cooperation. In the Commission's report, the text of draft article 43 was accompanied by a footnote reproducing a proposal placing the onus on the responsible international organization rather than on its members. Although that proposal had received some support in the Commission on the grounds that it might prompt international organizations to adapt their internal rules in order to meet their obligations under Part Two, the majority of members had considered that that requirement did not need to be restated, as it was already implied in the obligation to make reparation.

33. The last chapter of Part Two of the draft articles, namely Chapter III, was composed of two draft articles relating to serious breaches of obligations under peremptory norms of general international law. Draft article 44 stated that chapter III applied to infringements by international organizations of obligations under peremptory norms of general

international law. The risk of a breach by an international organization of an obligation under *jus cogens*, although unlikely, could not be ruled out. Hence there appeared to be no reason in that respect to draw a distinction between the situation of a State and that of an international organization.

34. Draft article 45 set out the particular consequences of a serious breach within the meaning of draft article 44 and it should be interpreted as laying down the general consequences applying as a minimum in the event of a serious breach by an international organization of an obligation under *jus cogens*. Some specific rules might indeed entail resort by States and international organizations to consequences other than those outlined in the draft article. It was clear, however, that draft article 45 did not require international organizations to take any action outside their competences and functions as defined by their constitutive instruments or other pertinent rules.

35. In conclusion, he drew attention to two questions related to issues connected with the implementation of an international organization's responsibility on which the Commission would welcome the views of Governments and international organizations. The first was whether international organizations were entitled to claim cessation and reparation from another organization responsible for a breach of an obligation owed to the international community as a whole. The other was whether an injured international organization intending to resort to countermeasures would encounter restrictions in addition to those listed in the articles on State responsibility.

36. **Mr. Laurent** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the International Law Commission's report and website were its main tools for reaching out to States, international governmental and non-governmental organizations and international lawyers. As the Commission's work was widely appreciated, its report was eagerly awaited every year. It was, however, questionable whether it really found its way to those who needed it most, namely Governments' legal advisers, who formed the primary audience of the Commission's proposals. The valuable information contained in the report should therefore be made more readily available.

37. While States undoubtedly did their best to respond with regard to the specific issues on which comments would be of particular interest to the Commission, the latter had not always received a sample of replies which were representative enough to serve as a basis for further conclusions. One way of making the Commission's reports more user-friendly would be to explain the background to each of the specific issues by providing summaries of the discussion surrounding those issues.

38. Some streamlining and restructuring would make the wealth of information contained on the website more accessible. Particular attention should therefore be devoted to ways of simplifying the structure of the site and enhancing its appearance.

39. The forthcoming sixtieth anniversary of the Commission would provide an excellent opportunity to raise awareness of its work and to actively reach out to States, as well as to international intergovernmental and non-governmental organizations. The Nordic countries welcomed the recommendations made with respect to the anniversary in the report.

40. With regard to the Commission's long-term programme of work, "Subsequent agreement and practice with respect to treaties" would be a most suitable topic for inclusion.

41. Although the Commission and States had been well-served by the comprehensive memorandum prepared by the Secretariat on the effects of armed conflicts on treaties (A/CN.4/550) and the Special Rapporteur's thorough reports (A/CN.4/552, A/CN.4/570 and A/CN.4/578), he wondered why the Commission was seeking to define the term "armed conflict" instead of retaining the word "hostilities" to be found in article 73 of the Vienna Convention on the Law of Treaties.

42. The principle of continuity of treaty obligations in the event of an outbreak of armed conflict, as provided for in draft article 3, was essential in order to safeguard the security of legal relations between States. He therefore welcomed the Working Group's proposal to widen the concept of an armed conflict to encompass situations of occupation and internal conflicts which had reached a certain threshold of intensity. He also commended the new formulation of draft article 4, because the parties' intention was not necessarily the best guide for ascertaining whether a treaty should be terminated or suspended in case of an armed conflict; the other criteria proposed by the Working Group should also be taken into account, in

particular the actual effect of the armed conflict on the application of the treaty. The decision to terminate or suspend a treaty should be made on a case-by-case basis in the light of all the relevant factors.

43. Similarly, in draft article 7, a reference to the subject matter of a treaty, rather than to its object and purpose, would offer a more practical solution when drawing up the list of treaties to be included in the annex. The deletion of article 6 *bis* was warranted, since its wording did not adequately reflect the complexity of the issue in question. The substance of that draft article should be moved to the commentaries, as the Working Group had suggested. At the current stage of work, the scope of the draft articles should exclude treaties concluded by international organizations.

44. **Mr. Zinsou** (Benin), speaking on behalf of the African Group, said that States must abide by the rules of international law when they exercised their right to expel aliens from their territory. For that reason, the draft articles prepared by the Commission must secure respect for aliens' rights and fundamental freedoms by making the mass expulsion of aliens illegal. The draft articles should stipulate that expulsion must not rest on discriminatory grounds such as nationality, religion or ethnicity and that it must not be politically motivated. States should exercise their right to expel aliens cautiously, especially when the people in question were refugees, and they should pay due heed to the reasons why foreigners had fled from their home country.

45. When the Commission studied the effects of armed conflicts on treaties, it should scrutinize the effects of internal armed conflicts, foreign occupation and aggression on States' treaty-based obligations.

46. While international organizations must be held accountable for their wrongful acts, the approach taken to the responsibility of international organizations for such acts should be different to that adopted in respect of States, because of the disparate nature of their obligations under international law.

47. As for the new topics to be included in its work programme, the Commission should investigate questions which had a beneficial impact on developing countries, more particularly the protection of persons in the event of disasters and the most-favoured-nation clause.

48. **Mr. Trauttmansdorff** (Austria) said that his delegation commended the Secretariat for its comprehensive analysis of national legislation on the expulsion of aliens (A/CN.4/565), which was a precondition for the Commission's successful codification of the topic. In draft articles 1 and 2, the scope to the draft articles and the definition of "alien" should be based on the notion of "national" rather than the somewhat broader and less precise notion of "*ressortissant*". With regard to draft article 4 on non-expulsion by a State of its nationals, Austria was of the opinion that the prohibition against the expulsion of nationals was unconditional and absolute. The principle set out in paragraph 1 of draft article 4 should not be qualified, as it currently was by paragraphs 2 and 3, which referred to "exceptional reasons". Any such exception would be inconsistent with various human rights instruments and those two paragraphs should therefore be deleted.

49. Draft articles 5 and 6 on the non-expulsion of refugees and of stateless persons, should not make an explicit reference to terrorism; any terrorist activity by an asylum-seeker or a stateless person would be covered by the reference to "national security or public order". Paragraph 1 of draft article 5 should be consistent with the 1951 Convention relating to the Status of Refugees and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and therefore should include a reference to the principle of non-refoulement to make it clear that the draft articles did not intend to modify the established rules and existing human rights guarantees under international law. In addition, language should be included to the effect that a refugee must not be expelled to a country where there were substantial grounds for believing that he or she would be in danger of being subject to torture or other forms of cruel, inhuman or degrading treatment or punishment, regardless of whether such acts were committed by public authorities or non-State actors. Such a provision would reflect established international practice.

50. On the topic of the effects of armed conflict on treaties, his delegation agreed with the Working Group of the Commission that the draft articles should apply to all treaties between States at least one of which was a party to an armed conflict; that should be clearly indicated in draft article 1 on scope. With regard to the definition of "armed conflict", it was his delegation's

long-standing view that the articles should deal only with international armed conflicts; the definition could be based on the formulation in the judgment of the International Tribunal for the Former Yugoslavia in the case of The *Prosecutor v. Duško Tadić a/k/a "DULE"*. It could encompass situations of occupation as addressed by the 1907 Hague Regulations concerning the Laws and Customs of War on Land, the 1949 Geneva Conventions and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

51. In draft article 3 on non-automatic termination or suspension, the term "ipso facto" better reflected the legal situation than the term "necessarily", since it would make it clear that any break in treaty relations did not happen automatically but required a deliberate act by a State party. Draft article 4 raised the question of whether the intention of the parties at the time the treaty was concluded should be decisive for the susceptibility to termination or suspension of a treaty in case of an armed conflict. In any case, the provision would have to be brought into line with draft article 7, and, if the reference to "object and purpose" was retained, it would be useful to align it with the Commission's draft guidelines on reservations to treaties. In draft article 6 bis the term "standard-setting treaties" had no commonly accepted meaning; the article should be either deleted or reformulated.

52. With regard to the topic of the responsibility of international organizations, his delegation shared the view expressed during the Commission's debate that the draft articles did not sufficiently take into account the great variety of international organizations and their statutory and de facto relations with their member States.

53. Among the new articles proposed, draft article 43 on ensuring the effective performance of the obligation of reparation was of particular concern. In its current form, it clearly did not reflect customary law or State practice but constituted progressive development of international law. Despite the explanation that it was of an expository character, it was one of the key articles affecting the relation between the responsibility of an organization and the legal effects for its members and it therefore required further deliberation.

54. An international organization might be unwilling or unable to compensate an injured party because it was not enabled to do so by its members. However, international practice did not seem to support an obligation for member States to bear the financial consequences of an illegal or *ultra vires* act attributed to the international organization, and his delegation would not support such an attempt to "pierce the corporate veil" and hold the members responsible. On the other hand, member States that enabled an international organization to act on the international plane were accepting the risk that the organization might violate international law. Since that risk could not be left with the injured party, it was reasonable that the risk should be borne by the collectivity of the members, although the responsibility to compensate was the organization's. In principle, therefore, his delegation supported the idea of inserting a provision to ensure that the organization was sufficiently equipped by its member States to enable it to make full reparation to an injured party in accordance with draft article 34. The current wording of draft article 43 was, however, out of line with the logic of the draft articles, which concerned the responsibility of international organizations, not of States. Moreover, it did not clearly establish a legal obligation on the part of member States to provide the organization with the means for effectively fulfilling its obligations under draft article 34. His delegation therefore favoured the proposal mentioned in paragraph (4) of the commentary to the draft article, namely, to state expressly that "the responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under this chapter". The rationale of the proposal was to commit the responsible organization to organizing its budget in a manner which ensured the satisfaction of an injured party. At the same time, it would oblige the members of an international organization to provide the means to meet the financial consequences of illegal activities or *ultra vires* acts attributed to their organization. If the responsible organization were to be dissolved before compensation was paid, the proposal would make possible proper budgetary liquidation of the outstanding liability.

55. **Mr. Márslco** (Argentina) said his delegation hoped that the Commission's efforts to codify the international rules on the expulsion of aliens would lead to a new regime in which the rules and principles of general international law would take the place of

discretionary decisions by States in confronting the increasingly difficult problem of international movement of persons.

56. With regard to specific draft articles, there was no need to use the term "*ressortissant*" in draft articles 1 and 2, since the term "national" was more precise and was generally accepted in international law. In draft article 3, the limits on the right of expulsion in paragraph 2 were too vague and general, since international law set precise limits on expulsion, for instance, in the case of refugees.

57. Draft article 5 on non-expulsion of refugees presented certain problems. In any attempt at codification, clearly aimed at limiting abusive restrictions on the international movement of persons, it was essential not to harm the most vulnerable categories of aliens, such as refugees, whom international law sought to protect. The various international sets of rules relating to the protection of fundamental human rights, among them the international rules governing refugees, were closely interrelated and were in the process of convergence. Draft article 5 appeared to be attempting to redraft or amend a body of rules generally accepted by the international community. His delegation agreed with the view that the proposed language, especially the *in limine* determination that paragraph 2 entitled the receiving State to make regarding the purpose of the refugee's application, went beyond the limits of the 1951 Geneva Convention. As was stressed by the Office of the United Nations High Commissioner for Refugees in its *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, a person "does not become a refugee because of recognition, but is recognized because he is a refugee". From the moment an application for refugee status was submitted, principles such as *non-refoulement* applied.

58. Moreover, his delegation was concerned about the proposed reference to terrorism in draft article 5, paragraph 1, as grounds for expelling a refugee. The mere existence of an extradition request alleging the commission of terrorist acts should not be sufficient grounds for the rejection *in limine* of an application for refugee status. The application should receive consideration in accordance with the principles of due process and legal guarantees, and the principle of *non-refoulement* should be respected. Therefore, his delegation would prefer to have the Commission refrain from proposing new rules about refugees and limit itself to a simple provision that the draft articles were without prejudice to the rules and principles of international law relating to refugees.

59. With regard to draft article 7 on the prohibition of collective expulsion, his delegation was in favour of the general principle enunciated in paragraph 1 but doubted that the exception set forth in paragraph 3 was consistent with international humanitarian law. In general, it would urge the Commission to proceed cautiously when elaborating rules related to fundamental principles of international law.

60. In relation to the topic of the effects of armed conflicts on treaties, it was important to bear in mind that information on State practice involving bilateral or multilateral treaties would only be impartial if the views of all the States involved in the particular case were obtained. The analysis of which obligations in a given treaty must continue to be fulfilled during or after armed conflict should be sharply differentiated from the analysis of the factual or legal situations recognized by the parties at the time the treaty was concluded. The principle of good faith required that such recognition could not be altered by armed conflict. The recognition of the existence of a dispute, for example, by a State party to that dispute could not be altered by armed conflict. The principle of the continuity of treaties, set forth in draft article 3, was fundamental. His delegation encouraged the Commission to continue its work on the topic along those lines and to approach the law of treaties in the light of the prohibition against recourse to the threat or use of force in the Charter of the United Nations.

61. The draft articles on the responsibility of international organizations would be highly useful to States and international organizations, especially in view of the complexity of the topic and the scarcity of relevant practice it. His delegation approved of the use of the articles on State responsibility as a template wherever applicable. The generality of the schema made it applicable to a wide variety of international organizations.

62. Of the 14 new draft articles in Part Two, his delegation supported the wording of draft articles 31 to 34 on general principles, which were based on the articles on State responsibility, and approved of the approach taken in draft articles 35 and 36, which

included provisions specific to international organizations. It agreed that there was no reason not to borrow language from the articles on State responsibility for draft articles 37 to 42 on forms of reparation. With regard to draft article 43, the obligation to provide a responsible organization with the means to make reparation depended on the internal rules of the organization. The basic principle that the organization had a distinct legal personality separate from that of its members should be maintained; in that light, any concurrent or residual responsibility of a Member State would depend on the specific nature of the organization, its constituent instruments, its established practice and the other elements mentioned in draft article 4, paragraph 4, defining the "rules of the organization". However, his delegation considered it necessary to include a provision, or at least a recommendation, that international organizations should take appropriate measures in advance to meet future obligations to make reparation.

63. His delegation supported the formulation of draft articles 44 and 45 based on the corresponding provisions of the articles on State responsibility, with the proviso regarding draft article 45 that the obligation of an international organization to cooperate to bring to an end through lawful means any serious breach must take into account the ability of the organization to act depending on its mandate.

64. In response to the question posed by the Commission in connection with draft article 48, to be considered during its next session, his delegation thought that an international organization might be entitled to bring a claim if a breach of an obligation owed to the international community as a whole was committed by another international organization, provided the first-mentioned organization had a mandate to defend the general interests of the international community. The question of the resort to countermeasures by an international organization should be approached with great caution; if an international organization were recognized as having that right, it could only be because the organization had a close connection to the right protected by the obligation breached.

65. Lastly, his delegation supported the commemoration of the Commission's sixtieth anniversary in 2008.

66. **Mr. Kamal** (Egypt) said that his delegation supported the proposal of a commemorative meeting with legal advisers in honour of the Commission's sixtieth anniversary. On the topic of expulsion of aliens, this delegation agreed with the principle set forth in draft article 3, paragraph 2, that States, in exercising the right to expel aliens, must abide by their obligations in accordance with the fundamental principles of international law; however, the Commission should identify those fundamental principles. There was an increasing tendency on the part of States, in their efforts to combat terrorism or to stem a flood of illegal immigration, to expel aliens resident in their territory without respect for fundamental human rights norms set out in international agreements. States should refrain from mass expulsions and from expelling aliens without objective evidence or for discriminatory reasons based on religion, culture or ethnicity.

67. In the case of refugees, Egypt complied with the 1951 Geneva Convention and made a general practice of coordinating with the Office of the High Commissioner for Refugees when taking decisions to expel refugees resident in its territory.

68. With respect to the draft articles on the effects of armed conflicts on treaties, his delegation affirmed the importance of ensuring the stability of treaty relations between States in accordance with the 1969 Vienna Convention on the Law of Treaties, not only during peacetime but also during armed conflicts. Since parties concluding a treaty in time of peace did not normally provide for what would happen in the case of armed conflict, objective criteria other than the intention of the parties were needed to determine the enforceability of treaties during armed conflicts. That included the need to distinguish among the various types of treaties. Treaties normally implemented in peacetime, such as trade and technical assistance treaties, might be suspended during armed conflicts, even if the parties had not expressly stated their intention to do so. Treaties normally enforced in wartime, such as those relating to humanitarian law or *jus cogens* rules, remained enforceable during armed conflict even if the parties had announced otherwise. Humanitarian assistance instruments, especially those concerning natural disasters, should be studied to determine their enforceability during armed conflict.

69. His delegation urged the Commission to study the effects of foreign occupation on the enforceability of

international treaties to which the State under occupation was a party and the obligation of the occupying Power to respect and implement such treaties. The Commission should also examine the difference in the legal effects of treaty obligations for the aggressor State and for the State subject to aggression, owing to the difference in their obligations under the Charter of the United Nations. The Commission should likewise study the effects of internal armed conflicts on the ability of a State to fulfil its treaty obligations.

70. In drafting articles on the responsibility of international organizations, the Commission should be careful when borrowing language from the articles on State responsibility. On the issue of reparation, a distinction must be made between the obligations of States as members of an international organization and the obligation of the organization itself. Consequently, draft article 43 should be amended so that either it referred only to the responsible international organization, which had independent legal personality under international law, or it referred to the respective obligations of the responsible organization and its member States to make reparation for injury in accordance with international law and the constituent instrument of the organization.

71. His delegation welcomed the Commission's decision to include in its programme of work the topics "Protection of persons in the event of disasters" and "Most-favoured-nation clause", in view of their importance to developing countries. However, the Commission should be cautious in its study of the topic "Immunity of State officials from foreign criminal jurisdiction", since unambiguous rules on the subject already existed, particularly in the Vienna Convention on Diplomatic Relations. It was one of the manifestations of State sovereignty that State officials should be prosecuted in their national courts.

72. **Mr. Liu** Zhenmin (China) said, with regard to the expulsion of aliens, that a wealth of legislation and practice on the treatment of aliens had accumulated at the international level. The International Law Commission should, therefore, have focused more on the codification of existing international law. As for the scope of the draft articles, the text as it stood dealt only with aliens who had entered a given territory. His delegation believed, however, that aliens within zones of immigration control should be accorded the same basic human rights protection as those already within the territory, even if their status was different, and should, therefore, be included within the scope of the topic. At the same time, a basic premise of the draft articles should be the State's right of expulsion as a general principle, while the prohibition of expulsion should be an exception.

73. In principle, his delegation endorsed the provisions on non-expulsion of refugees and stateless persons and on the prohibition of collective expulsion (draft articles 5, 6 and 7). The provisions on non-expulsion of refugees should, however, be formulated in strict conformity with the 1951 Convention relating to the Status of Refugees and its Protocols; the scope of the definition of the term "refugees" should not be expanded. The term "collective expulsion" should be clarified, with due regard for the different treatment appropriate to the particular circumstances of the persons facing expulsion.

74. With regard to the responsibility of international organizations, he noted that the draft articles were closely modelled on the draft articles on "State responsibility", albeit with amendments and additions, where necessary to reflect the special situation of international organizations. A number of provisions were, however, based on unwarranted assumptions, with the result that the commentary seemed inadequate and the analysis and exposition of specific instances insufficient. The draft articles should be supported by more references in the commentary to their legal and factual basis. The Commission should not lose sight of the primary rules of international law relating to the responsibility of international organizations. Since a breach of international obligations was a precondition for incurring responsibility, the Commission should first establish the status of international organizations, which, unlike States, did not have general rights and obligations under international law but only specific ones deriving mainly from their respective statutes and regulations. Once the obligations of international organizations were clearly identified, it would be possible to address the question of their responsibility.

75. With regard to the effects of armed conflicts on treaties, his delegation believed that the definition of armed conflicts in draft article 2 should not include internal armed conflicts as armed conflicts having effects on treaties. There was a qualitative difference between internal and international armed conflicts. The outbreak of an armed conflict between States would, as a matter of course, have an effect on treaties between

them. Parties to internal conflicts, however, were not States and their inclusion in the scope of the definition therefore had neither a legal nor a factual basis.

76. His delegation endorsed draft article 3, which stated that the outbreak of an armed conflict did not necessarily terminate or suspend the operation of treaties between the parties. That provision was a reflection of international practice since the Second World War regarding the continuity of treaties, as opposed to the traditional concept that a treaty was automatically terminated or suspended in case of an armed conflict. The draft article would contribute to the stability and healthy development of international relations.

77. With regard to susceptibility to termination or suspension of a treaty in case of an armed conflict, which was covered by draft article 4, his delegation agreed that the intention of the parties at the time that a treaty was concluded should be used as the main criterion for such susceptibility. Other relevant factors, such as the object and purpose, the provisions and the nature of the treaty concerned should, however, also be taken into account.

78. His delegation believed that the effect of the lawful use of force on the operation of treaties was different from that of the unlawful use of force. It endorsed the principle set out in draft article 10 that a State exercising its right of individual or collective self-defence, in accordance with the Charter of the United Nations, was entitled to suspend, in whole or in part, the operation of a treaty incompatible with the exercise of that right. States using force unlawfully were not entitled to terminate or suspend the operation of a treaty, since they might benefit from their unlawful action.

79. His delegation supported the inclusion in the Commission's programme of work of the topic "Immunity of State officials from foreign criminal jurisdiction". Work on the topic should focus on the codification of the rules of existing international law and should be based on the general principle of customary international law whereby State officials had immunity from foreign criminal jurisdiction. The denial of such immunity should be considered an exception.

80. **Ms. Popova** (Bulgaria) said that, in drawing up the draft articles on responsibility of international organizations, the International Law Commission had rightly used the articles on State responsibility as a starting point, since the aim of both sets of rules should be to introduce certainty and clarity into the most typical situations and thus serve as a guide for any grey areas or for rare situations. Nevertheless, each of the two sets of articles should be comprehensive and self-contained. According to draft article 1, paragraph 2, however, the draft articles on responsibility of international organizations covered the responsibility of a State for the internationally wrongful act of an international organization. Thus, if that paragraph and draft articles 25, 26, 27 and 28 were retained, the rules relating to State responsibility should be incorporated in two separate instruments, whose status might eventually differ. Furthermore, the focus of the draft articles currently under consideration might be shifted from the issue of responsibility to that of committing a wrongful act. The provisions on the responsibility of a State for the internationally wrongful act of an international organization should therefore be incorporated within the articles on State responsibility. As for the use of terms, it would be more appropriate to list all the definitions in draft article 2 rather than to scatter them throughout the text.

81. With regard to draft article 3, paragraph 2, her delegation had doubts about the provision that conduct entailing international responsibility might consist of an omission. As stated in the written comments by the United Nations Educational, Scientific and Cultural Organization, omission might be the result of failure to take a decision within a given organization owing to lack of support from its members. In such cases, omission should not be punishable; it should entail responsibility only if the organization failed to take action on a legitimately taken decision.

82. In draft article 8, paragraph 2, it was redundant to refer explicitly to the rules of the international organization, since paragraph 1 already covered all sources of obligations, including the internal rules of the organization. Moreover, paragraph 2 drew no distinction between the internal rules of an organization that formed part of international law and those that did not.

83. In view of the recent practice of giving the term "self-defence" a broader meaning when referring to action by United Nations forces the wording of draft article 18 should be reviewed. Her delegation could not accept that international organizations could be in a position to exercise the right to self-defence. Even in peacekeeping operations, for example, they would be acting within a mandate adopted by the Security Council, and that did not constitute self-defence.

84. With regard to draft articles 34 and 35, her delegation accepted the Commission's general approach. It welcomed the distinction made in the Special Rapporteur's report between the obligations owed by international organizations to members and those owed to non-members. On the question of whether there was an obligation on member States to support an international organization if it lacked the funds to meet its obligation to compensate an injured party, her delegation believed that financial inadequacy could not, per se, absolve the organization from the legal consequences of its responsibility under international law. At the same time, member States had an obligation to provide the organization with the means to carry out its activities, including those that had led it to incur responsibility towards a third party. Significant though the issue was, the mechanism for acquiring such funds should ultimately depend on the internal rules of the organization.

85. In draft article 39, some of the examples provided in the Special Rapporteur's report fell outside the scope of the topic, since they related to compensation paid by international organizations to individuals rather than to States or other international organizations.

86. Turning to the topic "Effects of armed conflicts on treaties", she commended the report by the Working Group which had streamlined the debate most effectively. The Commission's work would, however, be more practically orientated if treaties involving international organizations were included within the scope of the topic, given their ever-increasing number.

87. It was her delegation's view that an outbreak of hostilities had the same effect on treaties that were in force and treaties that were applied provisionally. The draft articles should reflect that fact. Article 25 of the Vienna Convention on the Law of Treaties dealt only with the termination of a provisionally applied treaty due to the declared intention of a State not to become party to that treaty; it could not apply to the termination of such a treaty because of an armed conflict.

88. Her delegation noted with satisfaction the decision to include internal armed conflicts in the definition of the term "armed conflict" in draft article 2. That was the right course of action, since, over the past few decades, internal armed conflicts had significantly outnumbered international ones. There was no danger of dividing opinion on the issue among Member States, since the draft articles did not deal with the legality of armed conflicts.

89. The most important aspect of the draft articles was the indicative list of categories of treaties the object and purpose of which involved the necessary implication that they continued during an armed conflict. The list of categories would be even more useful if it were extended to include treaties codifying rules of *jus cogens* and treaties delineating land and maritime boundaries, which, by their nature, also belonged to the category of permanent regimes.

90. **Ms. O'Brien** (Ireland), commenting on the draft articles on responsibility of international organizations, said, firstly, that although no draft article had yet been formulated on the recognition of the separate international legal personality of an international organization, it had been suggested that recognition of such personality by an injured State was necessary before the organization had an obligation to make reparation for the injury caused. The question raised important legal and practical considerations. The international legal personality of an organization — which was a prerequisite to its having international responsibility under the draft articles — might arise even in the absence of express provisions to that effect in its constituent instrument. In its 1949 advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, the International Court of Justice had held that the separate legal personality of an international organization might be inferred in certain circumstances from the competences, powers and purposes that the member States had given to it. To require an injured State to recognize the legal personality of an international organization before that organization was obliged to make reparation might thus be at odds with the Court's opinion. It also raised the practical consideration of how to determine whether such recognition had occurred.

91. Secondly, with regard to draft articles 34 and 37-40, which outlined the duty of an international organization to make reparation and the forms that such reparation might take, a difficult question arose as to whether member States were under an obligation to provide an international organization, in any circumstances, with the necessary resources — financial or otherwise — to make reparation. The Special Rapporteur had correctly pointed to the lack of practice evidencing any obligation on member States to make extraordinary payments to finance reparations. However, some obligation on the part of member States should be included in the draft articles as a rule of progressive development, in view of the importance of reparations to an effective regime of responsibility. To

do otherwise might suggest that States could escape liability by acting collectively through an international organization.

92. Her delegation welcomed the introduction of draft article 43 which related to the effective performance of the obligation of reparation. It had some reservations about the current wording, however, which provided that members were required to take all appropriate measures "in accordance with the rules of the organization". Although primacy should be given to any internal rules of an organization that might be decisive in determining the means by which the constituent member States ensured that reparation could be made, her delegation's concern was that a member State might seek to rely on such internal rules to escape responsibility, in a case where, for example, the rules expressly prohibited extraordinary financial contributions from members to finance reparations. She therefore urged the Commission to re-examine the text of the draft article.

93. With regard to draft article 35, the Special Rapporteur rightly made a distinction between obligations owed by international organizations to their members and those owed to non-members. Whereas the rules of an organization in relation to non-member States were similar to the internal laws of a State and could not be relied upon as justification for failure to comply, the situation with regard to member States was that the rules of the organization might well be relevant. Even if there was little practice to support the principle, it was sound as a matter of progressive development, since it was fully consistent with the structural principle of consent that underlay international law.

94. Thirdly, draft articles 44 and 45, which concerned the serious breach of obligations under peremptory norms of general international law, were incompatible with their counterparts in the articles on State responsibility. Admittedly, draft article 44 corresponded to article 40 of the latter articles; but draft article 45 addressed the consequences for other international organizations and for States of a serious breach by an international organization, whereas article 41 on State responsibility addressed only the consequences for other States, with no reference to international organizations. It was a lacuna that could cast doubt on the obligations of an international organization in the event of a serious breach of a peremptory norm by a State. True, the draft articles, as currently formulated, were not intended to exclude such obligations arising under customary international law. In the interests of comprehensive codification, however, her delegation proposed that the scope of draft articles 44 and 45 should be revisited to address the consequences for an international organization of serious breaches of peremptory norms either by a State or by another international organization.

95. Any consideration of the duty of States and international organizations to cooperate in bringing a serious breach to an end should include a recognition that they differed greatly in their capacity as international legal persons. The advisory opinion of the International Court of Justice on *Reparations for Injuries Suffered in the Service of the United Nations* distinguished between States, which possessed the totality of international rights and duties recognized by international law, and organizations, whose rights and duties depended on their purpose and function. An international organization might thus be unable to respond to a *jus cogens* breach in the same way as a State. She therefore welcomed the Commission's statement that draft article 45 was not intended to confer on an international organization duties that exceeded its mandate.

96. Fourthly, the acknowledged difference in the capacity of international organizations and States highlighted the need to consider the diversity of international organizations in formulating the draft articles. At the same time, as illustrated by the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, there were identifiable common principles of international law applicable to all international organizations. In that connection, her delegation accepted the Special Rapporteur's view that the draft articles were formulated in general terms and that the implementation of the principles therein might differ from one international organization to another, having regard to special rules of international law. It welcomed the suggestion that a text might be included, along the lines of article 55 of the articles on State responsibility, to address the issue.

97. **Mr. Taksøe-Jensen** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the fifth report of the Special Rapporteur on responsibility of international organizations (A/CN.4/583) had provided a helpful overview of a complex subject and provided a framework for the Commission's work. It was to be hoped that States would provide the Commission with further examples of practice and case law. The Nordic countries supported the continued reliance on and

reflection of the provisions of the articles on State responsibility in the elaboration of the draft articles on responsibility of international organizations. The nature of international organizations, however, as the Commission itself recognized, meant that a number of modifications had to be made. The role and function of such organizations in international cooperation should be given careful consideration.

98. The Nordic countries were in broad agreement with the provisions of draft articles 31 to 45. With regard to draft article 43, however, although they could accept the inclusion of the article, as suggested by the Drafting Committee, if only as a general principle of international law, it did not follow that a subsidiary responsibility arose for member States when the organization in question was not in a position to provide compensation. As stated in the draft article, the measures to be taken by member States on providing the organization with funds were governed by the internal rules of that organization. While a general duty for member States to provide funds might be implied in the internal rules of the organization, those rules did not confer rights on possible third parties to which the organization might owe obligations.

99. With regard to the two specific questions posed by the Commission, the Nordic countries had only very preliminary comments. On the question of whether, in the case of the breach by an international organization of an obligation owed to the international community as a whole, there should be a right for other international organizations to make a claim of cessation and reparation to the injured party, the Nordic countries considered that it would be useful to include in the draft articles an article reflecting article 48 of the articles on State responsibility. Since international organizations had an international legal personality they should, in principle, be in a position to make a claim to bring the violation of basic obligations to an end.

100. At the same time, the restricted mandate and purpose of a number of international organizations should be borne in mind, since in that regard they differed fundamentally from States. It would be a mistake, too, to expand their mandate indirectly by giving the article parallel to article 48 on State responsibility too broad a scope. One possibility would be to restrict the entitlement of international organizations to make claims relating to *erga omnes* obligations in such a way that they could claim only in relation to obligations falling within the scope of the mandate of the organization in question. It might not be easy to define such a rule, however, or to determine in a given case whether a claim could be said to be within the scope of the organization's mandate.

101. With regard to the question of the right of international organizations to resort to countermeasures, the most appropriate approach would be to echo articles 49 to 53 of the articles on State responsibility. A preliminary consideration of the question had not led the Nordic countries to identify any reasons for affording international organizations more restricted or indeed broader access to countermeasures than that afforded to States.

102. Lastly, he drew attention to a decision of 2 May 2007 by the European Court of Human Rights in the cases *Agim Behrami and Bekir Behrami v. France* and *Ruzdi Saramati v. France, Germany and Norway*, which touched on some interesting issues relating to the responsibility of international organizations. The cases concerned certain acts and omissions by the international forces in Kosovo, the question being whether a number of European States that had provided personnel were responsible under the European Convention on Human Rights for those acts. The Court had found that it was not competent *ratione personae* to review the complaint against those States, because the acts in question were in fact attributable to the United Nations, though that was not to say that the United Nations should be responsible for all actions carried under its mandate. It was not clear to what extent the Court would have reached the same conclusion with regard to acts that took place during other peacekeeping operations under Chapter VII of the Charter of the United Nations. It would probably depend on the particular command and control structure, and the legal framework of each individual operation. The Sixth Committee should, in the future, consider the issue of responsibility for the United Nations and other international organizations in such complex situations and the question of striking the right balance between the responsibility of organizations and their member States in the context of peacekeeping operations.

The meeting rose at 1 p.m.